

1 **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**
2 **OF THE STATE OF MONTANA**

3 In the matter of the amendment) **PRESIDING OFFICER REPORT**
4 of ARM 17.8.1101, 17.8.1102, and)
5 17.8.1103 and 17.8.1107, the)
6 adoption of new rules I through III))
7 and the repeal of 17.8.221)
8 pertaining to the protection of)
9 visibility in mandatory Class I)
10 federal areas)

11 **INTRODUCTION**

12 1. On October 9, 2002, I presided over and conducted
13 the public hearing held in Room 111 of the Metcalf Building,
14 1520 East Sixth Avenue, Helena, Montana, to take public
15 comment on the above-captioned matter. Notice of the hearing
16 was contained in 2002 Montana Administrative Register (MAR)
17 No. 15, MAR Notice No. 17-168, published on August 15, 2002.
18 A copy of the notice is attached to this report.

19 2. The hearing began at about 9 a.m. and concluded at
20 about 9:39 a.m. A court reporter, Rosi E. Christensen,
21 recorded the hearing.

22 3. I announced that persons at the hearing would be
23 given an opportunity to submit their data, views, or
24 arguments concerning the proposed action, either orally or in
25 writing. Written comments received at the hearing and
26 afterward during the public comment period are attached to
27 this report.

28 4. At the hearing I identified and summarized the MAR
29 notice, stated that copies of the MAR notice were available
30 in the hearing room, read the Notice of Function of

1 Administrative Rule Review Committee as required by Mont.
2 Code Ann. § 2-4-302(7)(a), informed the persons at the
3 hearing of the rulemaking interested persons list and of the
4 opportunity to have their names placed on that list, recited
5 the authority to make the proposed rule, announced the
6 opportunity to present matters at the hearing or in writing,
7 as stated in the MAR notice, and explained the order of
8 presentation.

9 5. At the conclusion of the hearing I announced that
10 the proposed rulemaking was expected to be considered by the
11 Board at its meeting on December 6, 2002.

12 **SUMMARY OF HEARING**

13 6. Debra Wolfe, DEQ, made an oral statement and
14 submitted a letter, hearing testimony outline, hearing
15 testimony text (which is substantially similar to her oral
16 statement), copy of the MAR notice, copy of the notice with
17 proposed revisions, the HB 521/HB 311 review prepared by DEQ
18 Deputy Chief Counsel Rusoff, and a copy of a recent opinion
19 of the Court of Appeals, District of Columbia Circuit, in
20 American Corn Growers Ass'n v. EPA.

21 Ms. Wolfe also submitted a letter dated October 7, 2002,
22 from the United States EPA, Region 8.

23 DEQ recommends adoption of the proposed rulemaking, with
24 revisions.

25 7. Don Allen, Western Environmental Trade Association,
26 suggested some revisions and clarifications of the proposed
27 rulemaking:

1 To clarify that BART would be applied only when BART
2 would enhance air quality, the following words could be added
3 to the end of New Rule II(1) and (2): "or that application
4 of BART to the source would not enhance visibility in Class I
5 areas."

6 The definition in Rule 17.8.1101(14) should be more
7 specific.

8 Similarly, the definition in Rule 17.8.1101(23) leaves
9 too much up to the judgment of DEQ and does not explain if
10 the visibility concern is within the Class I area or from
11 outside the Class I area toward the Class I area.

12 New Rule II(5) gives the federal land manager an
13 opportunity for comment before anyone else. Why should there
14 be such preferential treatment?

15 New Rule III(1)(f) is related to the suggestion to add
16 language to New Rule II(1) and (2). BART should not be
17 required unless it would actually enhance visibility.

18 **SUMMARY OF WRITTEN MATERIALS**

19 8. The HB 521 review prepared by DEQ Deputy Chief
20 Legal Counsel Rusoff states that certain findings are
21 required before adopting a rule that is more stringent than a
22 comparable federal regulation or guideline. Much of the
23 proposed rulemaking adopts language from, or incorporates
24 documents referenced in, federal regulations. Thus, it is
25 not more stringent than comparable federal rules. The
26 proposed rules have procedural provisions that are not
27 provided in federal rules. However, such procedural

1 provisions do not make the State rules more stringent than
2 comparable federal rules.

3 9. The HB 311 review prepared by Mr. Rusoff, which
4 includes a Private Property Assessment Act Checklist, notes
5 that the proposed rulemaking could affect the use of private
6 real property by requiring BART (best available retrofit
7 technology) for existing major stationary sources that impair
8 visibility in Class I federal areas, but does not have taking
9 or damaging implications.

10 10. The hearing testimony outline, hearing testimony
11 text, and copy of the notice with proposed revisions
12 submitted by Ms. Wolfe explain and show changes made in the
13 initial notice based upon comments from EPA.

14 11. The opinion of the Court of Appeals in American
15 Corn Growers Ass'n v. EPA, shows that on May 24, 2002, the
16 court vacated portions of the EPA's Haze Rules. The court
17 ruled that under the applicable section of the Clean Air Act,
18 states decide which sources impair visibility on a source-by-
19 source basis, and states decide what BART controls should
20 apply to those sources.

21 12. The letter from the EPA, Region 8, dated October 7,
22 2002, provided many comments about the proposed rulemaking.
23 Notably, the EPA declared, "New Rule II and the definition of
24 'significant impairment' are not approvable as currently
25 written."

26 13. The National Park Service (NPS) and the U.S. Fish
27 and Wildlife Service (FWS) provided a joint letter dated

1 October 10, 2002, making many comments about the proposed
2 rulemaking. Several of these comments are similar to the
3 comments made by EPA. In addition, NPS/FWS recommend
4 incorporation by reference in ARM 17.8.1102 of two additional
5 publications.

6 14. Attorney Charles Hansberry submitted comments on
7 behalf of several clients of the Holland & Hart law firm:
8 Smurfit-Stone Container, Exxon Mobil Corp., Holcim USA Inc.,
9 Louisiana Pacific Corp., Stillwater Mining Co., and
10 Imperial/Holly Sugar.

11 a. Mr. Hansberry asked that rulemaking be
12 deferred. The EPA disapproved various state rules in 1987,
13 but in the 15 years since then, EPA and federal land managers
14 have not pursued the issue. There are three aspects to
15 visibility impairment: individual major sources, long-term
16 strategy, and regional haze. The proposed rules only address
17 individual major sources and a federal court recently
18 overturned EPA's regional haze rules in the American Corn
19 Growers case.

20 b. If the Board should decide to adopt visibility
21 rules, Mr. Hansberry had detailed suggestions for changes in
22 the proposed rules and disagreed with EPA's opposition to New
23 Rule II.

24 15. Ash Grove Cement Co. submitted a letter stating
25 that its concerns were identical with those of other industry
26 such as Holcim, Louisiana Pacific, Exxon Mobil, Stillwater
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1 Mining, and Imperial/Holly Sugar. The content of the letter
2 was the same as the letter submitted by Mr. Hansberry.

3 16. Attorney Catherine Laughner submitted comments on
4 behalf of Bull Mountain Development Co. Noting the federal
5 court decision in American Corn Growers, her client supports
6 New Rule II and suggested changes to New Rule III(6).

7 17. Anne Hedges, Program Director, Montana
8 Environmental Information Center (MEIC), submitted a letter
9 explaining that MEIC does not support the rulemaking as
10 currently written.

11 a. There is no urgency to this rulemaking. The
12 state should wait and develop a complete package on
13 visibility impairment in Class I areas, instead of this
14 piecemeal approach. The reasonable necessity for this
15 rulemaking is not demonstrated. Fifteen years have elapsed
16 since the EPA disapproved certain rules, and these rules have
17 not been needed.

18 b. The proposed rules attempt to give the State
19 authority and discretion that is reserved to the federal
20 government by federal law and rule. There are many
21 significant differences between the proposed rules and
22 existing federal rules without explanations for the
23 differences or how the differences would be reconciled.

24 c. The American Corn Growers case involved the
25 regional haze program. It is not a precedent for this
26 rulemaking, which concerns reasonably attributable sources.

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1 d. An HB 521 analysis is required, because the
2 proposed rules require more information from federal land
3 managers than required under federal law.

4 18. DEQ submitted additional written comments on
5 October 16, 2002. These comments address the state exemption
6 procedure of New Rule II, EPA's suggestions for making the
7 rules approvable, various modeling issues, and the scope of
8 the rulemaking.

9 19. No other written comments were received. The
10 period to submit comments ended on October 16, 2002.

11 **PRESIDING OFFICER COMMENTS**

12 20. The Board has jurisdiction to adopt, amend, and
13 repeal rules for the administration, implementation, and
14 enforcement of the Clean Air Act of Montana. Mont. Code Ann.
15 § 75-2-111(1). The Board has specific authority to establish
16 limitations of emissions from any source. Mont. Code Ann.
17 § 75-2-203.

18 21. House Bill 521 (1995), generally provides that the
19 Board may not adopt a rule that is more stringent than
20 comparable federal regulations or guidelines, unless the
21 Board makes written findings after public hearing and
22 comment. With the additional changes to New Rule I proposed
23 by DEQ, the proposed amendments are not more stringent than a
24 comparable federal regulation or guideline. Therefore
25 written findings are not necessary.

26 22. House Bill 311 (1995), the Private Property
27 Assessment Act, codified as Mont. Code Ann. § 2-10-101

1 through -105, provides that a state agency must complete a
2 review and impact assessment prior to taking an action with
3 taking or damaging implications. The proposed amendments
4 affect real property. A Private Property Assessment Act
5 Checklist was prepared in this matter. The proposed
6 amendments do not have taking or damaging implications.
7 Therefore, no further HB 311 assessment is necessary.

8 23. In my opinion, New Rule II conflicts with federal
9 law and is not supported by the opinion of the Court of
10 Appeals in American Corn Growers Ass'n v. EPA, 291 F.3d 1
11 (D.C. Cir. 2002).

12 a. In a decision split 2-1, the Court of Appeals
13 ruled that EPA's Haze Rule violated the Clean Air Act. The
14 court did not consider EPA's rules concerning visibility
15 impairment attributable to specific sources. The proposed
16 rulemaking in this matter pertains to these latter rules, not
17 to haze rules.

18 b. The court opinion correctly stated that federal
19 law gives the EPA administrator the authority to exempt a
20 source from BART requirements based on a determination that
21 the source does not contribute to a significant impairment of
22 visibility in Class I areas. The court also correctly stated
23 that the federal law "does not grant *the states* with a means
24 by which they can exempt sources based on individual
25 contribution determinations." 291 F.3d at 8.

26 c. The court stated that the "Haze Rule ties the
27 states' hands" and then speculated, "If the Haze Rule

1 contained some kind of mechanism by which a state could
2 exempt a BART-eligible source on the basis of an
3 individualized contribution determination, then perhaps the
4 plain meaning of the Act would not be violated." Id. I
5 disagree with the comments that find support for New Rule II
6 in this hypothetical language. New Rule II suffers from the
7 same defect that caused the court to strike down the EPA Haze
8 Rule in American Corn Growers--New Rule II violates the
9 express language of the Clean Air Act.

10 d. I have attached to this report a copy of the
11 controlling federal statute, 42 U.S.C. § 7491. The authority
12 of a state to make determinations concerning emissions and
13 best available retrofit technology (BART) is set forth in
14 § 7491(b)(2)(A) and (g)(2). The authority of the EPA
15 administrator to exempt sources from (b)(2)(A) is set forth
16 in § 7491(c). Under a basic rule of statutory construction,
17 the explicit grant of the exemption power to the EPA
18 administrator should be construed as excluding the exercise
19 of that power by others, such as states.

20 24. The procedures required by the Montana
21 Administrative Procedure Act, including public notice,
22 hearing, and comment, have been followed.

23 25. The Board may adopt the proposed rule amendments,
24 or reject them, or adopt the rule amendments with revisions
25 not exceeding the scope of the public notice.

26 26. Under Mont. Code Ann. § 2-4-305(7), for any acts in
27 the rulemaking process to be valid, the Board must publish a

1 notice of adoption within six months of the date the Board
2 published the notice of proposed rulemaking in the Montana
3 Administrative Register, or by February 11, 2003.

4 Dated this _____ day of October, 2002.

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THOMAS G. BOWE
Presiding Officer

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